

Chapter 9 **Civil Rights & Disadvantaged Business Enterprise**

Contents

SECTION/SUBJECT	PAGE
9.1 Introduction.....	1
9.2 Title VI of the Civil Rights Act of 1964 and Related Statutes.....	1
Title VI Implementation.....	2
9.3 Accessibility: Americans with Disability Act (ADA).....	6
ADA Implementation.....	6
ADA Monitoring.....	7
9.4 Equal Employment Opportunity (EEO) Contractor Compliance	8
EEO Implementation	9
EEO Monitoring	9
EEO Reporting	9
9.5 Disadvantaged Business Enterprise (DBE).....	10
Background.....	10
DBE Definitions.....	10
DBE Program Responsibilities	11
9.6 Local Agency Responsibilities under Caltrans DBE Program Plan	12
DBE Implementation Agreement for Local Agencies	13
Local Agency DBE Annual Submittal Form	13
Overall Statewide DBE Goal	14
DBE Liaison Officer	15
Required Contract Clauses	15
9.7 DBE Participation on the Contract	16
Participation Opportunities.....	16
DBE Contract Goals	16
Local Agency Bidder or Proposer DBE Commitment and DBE Information Forms.....	17
Final Report	17
Counting DBE Participation	18
9.8 Good Faith Efforts	23
Anticipated Good Faith Efforts.....	23
Administrative Review and Reconsideration	25
Substitutions.....	25
Noncompliance	26
9.9 References.....	26

Exhibits

Exhibits applicable to this chapter can be found at:

<http://www.dot.ca.gov/hq/LocalPrograms/lam/forms/lapmforms.htm#goHere8>

Exhibit 9-A DBE Implementation Agreement for Local Agencies

Exhibit 9-B Local Agency DBE Annual Submittal Form

Exhibit 9-C Local Agency ADA Annual Certification Form

Exhibit 9-D DBE Contract Goal Methodology

Exhibit 9-E Sample Evaluation of Good Faith Efforts

Chapter 9 Civil Rights & Disadvantaged Business Enterprise

9.1 INTRODUCTION

This chapter provides local agency guidance for complying with the Civil Rights requirements (Title VI of the Civil Rights Act, Accessibility, Equal Employment Opportunity Contractor Compliance) and Disadvantaged Business Enterprise (DBE) requirements for federal-aid transportation projects. The information contained in this chapter has been extracted from other documents and should not be considered as a replacement or substitute for the laws, rules and regulations, agreements, circulars, and other guidance available. Extensive reference is made to the United States Code (USC) and Code of Federal Regulations (CFR).

The Division of Local Assistance (DLA) website at:

http://www.dot.ca.gov/hq/LocalPrograms/DBE_CRLC.html provides additional information and resources that complement guidance in this chapter.

9.2 TITLE VI OF THE CIVIL RIGHTS ACT OF 1964 AND RELATED STATUTES

Title VI of the Civil Rights Act of 1964, prohibits discrimination based upon race, color, and national origin. Specifically, 42 USC 2000d states that “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”

In addition to Title VI of the Civil Rights Act of 1964, there are other nondiscrimination statutes that afford legal protection. These statutes include the following: Section 162 (a) of the Federal-Aid Highway Act of 1973 (23 USC 324) (sex), Age Discrimination Act of 1975 (age), and Section 504 of the Rehabilitation Act of 1973/Americans with Disabilities Act of 1990 (disability). For more information on disability, see Section 9.3 of this chapter. Taken together, these requirements define an over-arching Title VI, Nondiscrimination Program. Title VI and the additional nondiscrimination requirements are applicable to all programs administered by the recipient, in addition to programs receiving federal financial assistance, due to the Civil Rights Restoration Act of 1987.

There are two Presidential Executive Orders that place further emphasis on the Title VI protections of race and national origin:

1. Executive Order 12898 *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* directs federal agencies to develop strategies to address disproportionately high and adverse human health or environmental effects of their programs on minority and low-income populations. The order is also intended to promote nondiscrimination in federal programs substantially affecting human health and the environment, and to provide minority and low-income communities access to public information and an opportunity for public participation in matters relating to human health or the environment.
2. Executive Order 13166 *Improving Access To Services For Persons With Limited English Proficiency* directs federal agencies to evaluate services provided and implement a

Civil Rights & Disadvantaged Business Enterprise

system that ensures that Limited English Proficiency (LEP) persons are able to meaningfully access the services provided, consistent with, and without unduly burdening the fundamental mission of the local agency. Additionally, each federal agency shall ensure that recipients of federal financial assistance provide meaningful access to programs, services, and information to their LEP applicants and beneficiaries free of charge.

Language barriers prohibit LEP persons from:

- Obtaining services and information relating to transportation services, programs, and projects.
- Taking advantage of the transit system, which could affect their jobs and social opportunities.
- Understanding the benefits to which they are entitled when their home or business property is acquired through eminent domain.

Nondiscrimination provisions apply to all programs and activities of federal-aid recipients, sub-recipients, and contractors, regardless of tier (49 CFR 21).

Title VI Implementation

The Division of Local Assistance (DLA) is responsible for developing policies and procedures to help local agencies implement a Title VI Program. DLA has included checks and balances throughout its processes including legal review of major agreements and documents. Some of the following implementation processes are taken from various federal regulations for compliance with Title VI.

Assurances

Local agencies sign assurances as part of their Master Agreement (Exhibit 4-C) with Caltrans. The Program Supplement Agreement (PSA) (See Sample – Program Supplement Agreement (Exhibit 4-D)), for each project, includes the local agency's reaffirmation of the Nondiscrimination Assurances contained in the Master Agreement.

Designation of a Title VI Liaison Officer

As part of receiving federal financial assistance, each local agency shall designate a Liaison Officer who has a responsible position in the organization and easy access to the head of the agency. Identification of the Title VI Liaison Officer should be disseminated to the public via such methods as posting in public areas or on the agency's website (23 CFR 200.9 (b1)).

Title VI Nondiscrimination Statement

The local agency should develop a Title VI statement for signature by the head of the agency. The statement should give reasonable guarantee that the programs administered by the agency are conducted in compliance with all Title VI nondiscrimination requirements. The signed statement should be disseminated to the public via such methods as posting in public areas or on the agency's website (49 CFR 21.7(b)).

Title VI Complaint Procedures

A local agency that receives federal financial assistance is required to adopt procedures that incorporate appropriate due process standards and provide for the prompt and equitable resolution of complaints alleging discrimination on basis of race, color, national origin, age, sex, or disability.

Data Collection

The local agency should develop procedures for the collection of statistical data (race, color, national origin, age, sex, and disability) of participants in, and beneficiaries of, federally funded roadway projects, e.g., citizens impacted by relocation and participants attend the public hearing during an environmental review. In addition, the agency should analyze the data collected to determine the effectiveness of outreach methods to ensure that no group is excluded during the decision-making process or is not given an opportunity to voice their opinions or concerns.

Limited English Proficiency

As a recipient of federal financial assistance, the local agency must follow the “Enforcement of Title VI of the Civil Rights Act of 1964 – National Origin Discrimination Against Persons With Limited English Proficiency” (LEP Guidance) to ensure programs and activities normally provided in English are accessible to Limited English Proficiency (LEP) persons. Each local agency shall perform an annual assessment to determine if modifications are needed to their program and activities to ensure full access by LEP persons. For example, publications or public notices should be made available in languages understood by the affected population. Interpreters should be made available for LEP persons and for the hearing impaired (see Chapter 8, “Public Hearings,” of the LAPM).

More information on LEP and the LEP Guidance can be found at: www.lep.gov.

Contracts and Agreements

The local agency should include the provisions indicated in Appendix A of Exhibit B of the Administering Agency-State Agreement for Federal-Aid Projects Master Agreement in contracts and agreements, where applicable, between the local agency and the contractor.

Environmental

Presidential Executive Order 12898 Environmental Justice (EJ) is considered during the preliminary environmental investigation process and completion of the Preliminary Environmental Study (PES) Form. See Preliminary Environmental Study (PES) Form (Exhibit 6-A), Instructions for Completing the Preliminary Environmental Study (PES) Form (Exhibit 6-B), Chapter 6, “Environmental Procedures” of the LAPM, or refer to the local Assistance Environmental website: <http://www.dot.ca.gov/hq/LocalPrograms/env.htm>.

If a project requires that a Relocation Impact Study and/or Community Impact Assessment be conducted, the local agency follows the guidance set forth in the *Standard Environmental Reference* (SER). The SER is an on-line electronic reference that sets forth document content and format, as required by law or regulation and recommended format, if not specified by law or

regulation. Chapter 25 of the SER addresses EJ and LEP requirements:

<http://i80.dot.ca.gov/ser/vol1/sec3/community/ch25ej/chap25ej.htm>

Public Hearings and Public Involvement Meetings

The attendance and concerns of LEP persons, persons with disabilities, minority populations, and low income populations at public involvement meetings and hearings must be carefully documented to comply with Title VI of the Civil Rights Act of 1964, including statistics of participants by race and gender. Public hearing announcements must be made available in languages understood by the affected population. Public hearings should be held at locations that are both geographically and structurally accessible.

Right of Way

On federal-aid projects, all Right of Way (R/W) activities are conducted in accordance with Chapter 13, "Right of Way," of the LAPM and the Caltrans *Right of Way Manual*, unless the local agency has adopted its own Caltrans-approved procedures. These manuals require that the public be provided with Title VI information and complaint procedures within each of the following R/W functions: appraisals, acquisition, relocation assistance program and property management.

Construction

Federal-aid construction contracts must include provisions, which require compliance with Title VI. The specific contract provision language is included in the Federal Highway Administration (FHWA) Form 1273 that is physically inserted in the federal-aid construction contract (see Chapter 12, "Plans, Specifications and Estimate," of the LAPM).

Additional Resources for Title VI Implementation

You may access additional information on implementing Title VI (including potential Title VI issues, self-monitoring, good practices and mitigation measures) in Caltrans Title VI Guidelines available at: http://www.dot.ca.gov/hq/bep/title_vi/t6_guidelines_choice.htm

Title VI brochures in ten languages are available at:

http://www.dot.ca.gov/hq/LocalPrograms/DBE_CRLC/DBE_CRLC.html#TitleVI.

Title VI Monitoring

There are a number of actions that have been developed for the local agencies in meeting federal requirements. Attendance at public meetings by the District Local Assistance Engineer (DLAE) and receiving copies of the meeting minutes during the planning stages of local agency projects help to ensure nondiscrimination and EJ are properly being addressed at these early stages of a project.

To ensure continued compliance by the local agencies, checklists along with a review of the Plans, Specifications & Estimate (PS&E) and attendance at public meetings are some of the tools that are used initially, and then used later to facilitate the DLA in performing process reviews and other quality assurance functions. The local agency checklists and PS&E are reviewed by

the DLAE upon receipt to ensure compliance with Title VI as well as other federal and state regulations.

Plans, Specifications & Estimate Checklist

The PS&E Checklist (Exhibit 12-D) confirms the implementation of the mandatory requirements of FHWA Form 1273 such as Equal Employment Opportunity (EEO) certification, Disadvantaged Business Enterprise (DBE) provisions, and applicable wage rates. The local agency submits Exhibit 12-D to the DLAE along with the request for authorization to proceed with construction for federal-aid construction contracts.

Local agency Preliminary Environmental Studies, Technical Reports, Environmental Assessment, and Environmental Impact Statements provide for data collection and analysis on the demographics of neighborhoods and communities. The DLAEs and Caltrans Environmental Specialists review the environmental documents to ensure that no disproportionate adverse impacts occur on minority and low-income neighborhoods or communities.

Both the DLAE and Caltrans District R/W staff monitor R/W activities on local projects to ensure compliance with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.

Local Agency Construction Contract Administration Checklist

The Local Agency Construction Contract Administration Checklist (Exhibit 15-A), confirms that DBE and labor/EEO compliance requirements are performed and documented in the project files. Exhibit 15-A documents that the local agency will meet all of the requirements prior to the award of the construction contract (see Chapter 15, “Advertise and Award Project,” of the LAPM).

Resident Engineer’s Construction Contract Administration Checklist

The Resident Engineer’s Construction Contract Administration Checklist (Exhibit 15-B), is completed by the local agency Resident Engineer. The purpose of this checklist is to assist the local agencies in administering federal-aid highway construction projects. It also provides a record that the EEO/Wage Rate/False Statements posters are being posted at specific locations, that employee interviews will be conducted in accordance with the Labor Compliance/EEO interview form, and that DBE requirements are met. The local agency submits Exhibit 15-B, along with the Award Package shortly after award of the construction contract (see Chapter 15, “Advertise and Award Project,” of the LAPM).

Title VI Complaints

The procedures in this section have been established to receive and resolve alleged civil rights discrimination complaints concerning a local agency project or projects constructed with federal-aid funds. Caltrans will investigate and submit a report of findings to FHWA within 60 days of receipt of the complaint. The complainant will be informed by the Caltrans Discrimination Complaint Investigation Unit staff of the right to appeal the Caltrans findings to FHWA California Division. An appeal will be accepted by FHWA up to 180 days from the date of receipt of the decision.

Caltrans will include a summary report of its findings on all Title VI complaints in its annual Title VI update report to FHWA.

Title VI Compliance Reviews

As required under 23 CFR 200, Caltrans is responsible for conducting compliance reviews of local agencies to ensure local agencies comply with Title VI requirements.

9.3 Accessibility: Americans with Disability Act (ADA)

Section 504 of the Rehabilitation Act of 1973 (codified as 29 USC Subsection 791 et seq.) requires that any entity receiving federal financial assistance must ensure that persons with disabilities are not discriminated against in any and all aspects of employment, or denied access to the goods or services that these federal fund recipients provide.

The intent of Americans with Disability Act (ADA) (Public Law 101-336, codified as 42 USC 12101 et seq.) is to “assure equality of opportunity, full participation, independent living, and economic self-sufficiency for persons with disabilities.” This law extended the protections offered for persons with disabilities.

28 CFR 35 requires that facilities constructed on behalf of, or for the use of a public entity shall be designed and constructed so that the facility is accessible to and usable by persons with disabilities.

49 CFR 27 requires nondiscrimination on basis of disability in programs and activities receiving or benefiting from federal financial assistance.

The State of California has also adopted regulations - Title 24 of the California Government Code, specifying that all buildings, structures, sidewalks, curbs, and related facilities constructed in California by the use of State, county or municipal funds, or the funds of any political subdivision of the State, shall be accessible to and usable by persons with disabilities.

ADA Implementation

Assurances

Administering agencies sign ADA assurances as part of their Master Agreement (Exhibit 4-C) with Caltrans. The Program Supplement Agreement (PSA), (see Sample - Program Supplement Agreement (Exhibit 4-D) for each project, includes the administering agency’s reaffirmation of the nondiscrimination assurances contained in the Master Agreement.

Self-Evaluation and Transition Plan

49 CFR 27 requires local agencies as part of receiving federal-aid to:

1. Evaluate their current policies and practices to ensure nondiscrimination on the basis of disability in the design, construction, and maintenance of transportation and pedestrian facilities within their respective jurisdictions.
2. Identify deficiencies and remedies to correct deficiencies.

3. Develop a transition plan or schedule that includes milestones or measures of achievement. (See [Transition Plan](#) section for more information)
4. Develop a system for periodically reviewing and updating the evaluation and transition plan.

Designation of an Americans with Disability Act Liaison Officer

As part of receiving federal-aid, each local agency shall designate an Americans with Disability Act (ADA) Liaison Officer, who coordinates the efforts of the administering agency to comply with 49 CFR 27.

Adoption of Grievance Procedures

A local agency that employs fifteen (15) or more persons and is receiving federal-aid is required to adopt procedures that incorporate appropriate due process standards and provide for the prompt and equitable resolution of complaints alleging discrimination on the basis of disability.

Design

State and local governments, regardless of whether they receive federal financial assistance, are required to comply with Federal [2010 ADA Standards](#), Title 24 of the California Code of Regulations (which contains California building regulations), or local code, whichever provides the greatest access. Private-funded improvements within the public Right of Way are also required to comply with the federal [2010 ADA Standards](#) or with Title 24, whichever code offers the greatest access or protection to individuals with disabilities.

All new and altered pedestrian facilities such as, but not limited to, highway rest area facilities, sidewalks, crosswalks, pedestrian overpasses, underpasses, and ramps shall be made accessible to persons with disabilities in accordance with federal and state accessibility standards on all local agency federal-aid projects. Facility maintenance does not constitute an alteration. (See Chapter 11, "Design Standards," for what constitutes an alteration triggering accessibility requirements).

Certification

Local agencies certify compliance with federal, state, and local ADA regulations, laws, and codes in the PS&E Checklist (Exhibit 12-D).

ADA Monitoring

Local Agency Americans with Disability Act Annual Certification Form

Each local agency must provide the Caltrans DLAE with a completed Local Agency ADA Annual Certification Form (Exhibit 9-C) by June 30 of each year for the following Federal Fiscal Year (October 1 to September 30). The form must be received prior to submitting a "Request for Authorization" to proceed with a federal-aid project.

Exhibit 9-C includes:

1. Designated ADA Liaison Officer information (name, address, phone number, and e-mail address).

Civil Rights & Disadvantaged Business Enterprise

2. Certification that the local agency has an updated Self-Evaluation and Transition Plan. (If the local agency does not have an updated Self-Evaluation and Transition Plan, then the local agency provides an estimated date that they will have one.)
3. Certification of the adoption of a grievance procedure. (If the local agency does not have a grievance procedure, then the local agency provides an estimated date that they will have one.)

Field Reviews

During the field review, an agreement is reached among all interested parties (local agency, DLAE, FHWA) on the general design features and exceptions for the project. ADA deficiencies are discussed and agreed upon at this time (see Chapter 7, “Field Reviews,” of the LAPM).

Plans, Specifications & Estimate

Local agencies certify that their project’s Plans, Specifications & Estimate (PS&E) complies with all applicable federal and state regulations and codes (see Exhibits 12-C and 12-D, and Chapter 12, “Plans, Specifications & Estimate,” of the LAPM).

Final Inspection

The local agency conducts the final inspection and certifies on the Final Inspection Form (Exhibit 17-C) that the project was constructed in accordance with the scope and description of the project authorization document and that all federal and state requirements have been met. The DLAE reviews the job site and verifies completion on Exhibit 17-C (see Chapter 17, “Project Completion,” of the LAPM).

9.4 Equal Employment Opportunity (EEO) Contractor Compliance

The current Federal Transportation Act, 23 USC 140(a), and implementing regulations of 23 CFR 230, require that the local agency receiving federal financial assistance assure that employment in connection with federal highway construction projects is provided without regard to race, color, religion, sex, national origin, age or disability.

The local agency is also required to include notification of a federal-aid contractor’s EEO responsibilities in the advertised contract specifications. The local agency shall maintain and make available apprenticeship, skill improvement or other upgrading programs, which provide equal opportunity for training and employment without regard to race, color, religion, sex, national origin, age or disability.

Federal regulation 23 CFR 635.107 sets forth FHWA policy relating to federal-aid highway contract letting, and requires equal opportunity for DBE participation. Other sections of the CFR include nondiscriminatory bidding procedures, subcontractor and contractor responsibilities, labor, employment and Native American Indian preference provisions, payroll and statements of wages paid, and contract termination procedures.

Form FHWA 1273, Required Contract Provisions for Federal-Aid Construction Contracts, is a standard federal form containing required contract provisions and proposal notices and is required to be physically inserted into each federal-aid highway construction contract and

Civil Rights & Disadvantaged Business Enterprise

subcontracts (at any tier). When a contractor signs a federal-aid contract of \$10,000 or more, the nondiscrimination provisions in the Form FHWA 1273 constitutes the contractor's Equal Employment Opportunity/Affirmative Action Program standards for that contract.

EEO Implementation**Assurances**

Local agencies sign assurances as part of their Master Agreement with Caltrans. Appendix A to Exhibit B of the Master Agreement includes nondiscrimination in the selection and retention of sub-applicants and the prohibition of discrimination in employment practices.

Required Federal Contract Provisions

Local agencies shall physically insert the Form FHWA 1273 into the contract document. Local agencies are aware that contractor's noncompliance with the EEO specifications in the Form FHWA 1273 may be considered a breach of contract for which payment may be withheld, or the contract terminated (see Chapter 12, "Plans, Specifications & Estimate," of the LAPM).

Construction

Federal-aid prime contractors and subcontractors employment practices in the areas of recruitment and selection decisions (hiring, promotions, terminations, training) are to be conducted without regard to race, color, religion, sex, national origin, age or disability.

The local agency's resident engineer should be cognizant of the contractual requirement and monitor the contractor for compliance. Specifically, one of the resident engineer's area of concern should be whether discriminatory practices take place, particularly in the hiring, firing, training, promotion, and utilization of employees (see Section 16.12, "*Equal Employment Opportunity*," of the LAPM).

EEO Monitoring

The three checklists listed in Section 9.2 "Nondiscrimination: Title VI of the Civil Rights Act" serve to assist local agencies in implementing EEO and are monitoring tools for DLAEs to ensure that EEO requirements are met. In addition, DLA performs periodic EEO process reviews that include reviews of the DLAE, local agency, and contractor.

Caltrans OBEO includes local agency contracts in their compliance reviews of federal-aid contractors.

EEO Reporting

The federal-aid contractor on federal-aid construction contracts that are active during the last full pay period in July completes the Federal-Aid Highway Construction Contractor's Annual EEO Report (Exhibit 16-O).

9.5 Disadvantaged Business Enterprise (DBE)

Background

Caltrans is required under 49 CFR 26 to administer a Disadvantaged Business Enterprise (DBE) Program. The DBE Program is intended to ensure a level playing field and foster equal opportunity in federal-aid contracts. As a result, Caltrans periodically conducts studies that examine the availability, disparity, and discrimination of disadvantaged businesses in the transportation construction and engineering industry in California. Past studies have determined that discrimination continues to exist in the transportation contracting industry.

When establishing the overall DBE goal, Caltrans must include the level of DBE participation that local agencies could contribute. This will include an assessment of the subcontracting opportunities for specific items of work and the DBE availability for specific items of work. In other words, that level of subcontracting opportunities that DBEs could reasonably be expected to compete for on a contract.

DBE Definitions

Calendar Days – Unless stated otherwise, “days” in this chapter is understood to mean “calendar days” which includes weekends and holidays.

Disadvantaged Business Enterprise (DBE) – A for-profit “small business concern” that is at least 51 percent owned and controlled by one or more socially and economically disadvantaged individuals. One or more such individuals must also control the management and daily business operations. These individuals must be citizens (or lawfully admitted permanent residents) of the United States and (1) any individual who a recipient finds to be a socially and economically disadvantaged individual on a case-by-case basis, or (2) who are either African Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, (persons whose origin are from India, Pakistan, Bangladesh, Bhutan, Maldives Islands, Nepal or Sri Lanka), Women, or any other group found to be socially and economically disadvantaged by the Small Business Administration (See 49 CFR 26).

Race-Conscious Measure or Program – One that is focused specifically on assisting only DBEs. The use of contract goals is the primary example of a race-conscious measure in the DBE program.

Race-Neutral Measure or Program – A race-neutral measure or program is one that, while benefiting DBEs, is not solely focused on DBE firms. For example, small business outreach programs, technical assistance programs, and prompt payment clauses can assist a wide variety of small businesses not just DBEs. For purposes here, race-neutral includes gender neutrality.

Recipient – In this section the recipient of federal funds refers to Caltrans.

Small Business Concern – Small Business Concern means with respect to firms seeking to participate as DBEs in federal-aid contracts, a Small Business Concern as defined pursuant to Section 3 of the Small Business Act and Small Business Administration regulations implementing it (13 CFR 121) that also does not exceed the cap on average annual gross receipts specified in 49 CFR 26.65(b).

Civil Rights & Disadvantaged Business Enterprise

Statewide Overall DBE Goal — As required by Title 49 CFR 26, Caltrans has established a statewide overall DBE goal. This is the average level of participation that Caltrans would expect DBEs to achieve in California. In order to ascertain whether the statewide overall DBE goal is achieved, Caltrans will track DBE participation on all federal-aid contracts.

Sub-recipient — In this section sub-recipient refers to the Local Agency receiving federal funds.

DBE Program Responsibilities**FHWA Responsibilities**

The FHWA administers the payment of federal-aid highway funds to recipients: states, counties, cities, and other agencies for transportation-related projects. The FHWA is responsible for monitoring these agencies for compliance with Title VI and other aspects of the Civil Rights Acts of 1964, 1968, and 1973 concerning nondiscrimination in administration of federal funds.

Caltrans Responsibilities**The Office of Business and Economic Opportunity (OBEO)**

- Administer (Caltrans DBE Program Plan).
- Maintain a directory of certified DBE contractors.
- Establish statewide overall DBE goal and race-neutral and race-conscious component projections.

Division of Local Assistance (DLA)

- Provide technical assistance to the districts.
- Monitor local agency compliance with DBE program requirements by conducting process reviews. The FHWA and the district are invited to participate in these process reviews.
- Assemble statewide local agency DBE commitment, final utilization, and other information for reports to OBEO.
- Provide training for district and local agency staff.

District Local Assistance Engineer (DLAE)

- Monitor local agency compliance with DBE program requirements by participating in process reviews.
- Ensure that local agencies with federal-aid contracts submit a DBE Implementation Agreement for Local Agencies (Exhibit 9-A) form.
- Review and approve the Local Agency DBE Annual Submittal Form (Exhibit 9-B) for local agencies that award federal-aid contracts during the Federal Fiscal Year (FFY).
- Serve as the focal point for advice and assistance to the local agencies on DBE matters.

Civil Rights & Disadvantaged Business Enterprise

- Ensure that “Consultant Contract DBE Information” (Exhibit 10-O2) and “Local Agency Bidder DBE Commitment (Construction Contracts)” (Exhibit 15-G) are reported to the DLA in a timely manner.
- Ensure that the “Final Report-Utilization of Disadvantaged Business Enterprise (DBE), First-Tier Subcontractors” (Exhibit 17-F) is reported to the DLA.
- Provide DBE oversight of local agencies pursuant to the LAPM.
- Review at least one complete PS&E package (including DBE requirements) per agency, per year. If deficiencies are discovered, more frequent reviews should be conducted and a corrective action plan is to be submitted by the local agency for the DLAE’s approval.
- Maintain a file with an index of all local agency’s DBE Implementation Agreement for Local Agencies (Exhibit 9-A) and Local Agency DBE Annual Submittal Form (Exhibit 9-B). Information from these forms is entered into LP2000.

Local Agency Responsibilities

Local agency responsibilities are detailed in Section 9.6 of this chapter, and the responsibilities include:

- Submit the “*DBE Implementation Agreement for Local Agencies*” (Exhibit 9-A) and amendments to the DLAE.
- Designate a DBE Liaison Officer, accountable to the Chief Executive Officer of the local agency, to administer the Caltrans DBE Program as it pertains to local agencies.
- Ensure prompt and full payment to the prime consultant/contractor and subconsultants/subcontractors in compliance with the prompt payment clauses of the contract.
- Ensure that Consultant Contract DBE Information (Exhibit 10-O2) and Local Agency Bidder DBE Commitment (Construction Contracts) (Exhibit 15-G) are reported to the DLAE within 30 days of contract execution.
- Ensure that the Final Report-Utilization of DBE, First-Tier Subcontractors (Exhibit 17-F) is reported by the prime contractor or consultant upon completion of the contract.

9.6 LOCAL AGENCY RESPONSIBILITIES UNDER CALTRANS DBE PROGRAM PLAN

Local agency recipients of federal financial assistance shall comply with all the elements of Title 49 CFR 26 entitled “Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs.” These provisions apply to all federal-aid transportation projects. Local agency responsibilities are detailed in the Caltrans DBE Program Plan. A copy of this plan is available from the DLA DBE website at:

http://www.dot.ca.gov/hq/LocalPrograms/DBE_CRLC.html#.

As an initial step, each local agency shall submit a DBE Implementation Agreement for Local Agencies (Exhibit 9-A) form to formally acknowledge the local agency’s commitment to

implement the Caltrans DBE program, and to comply with all the prescribed responsibilities detailed in the LAPM.

Each local agency shall also submit the Local Agency DBE Annual Submittal Form (Exhibit 9-B). This annual form provides information for the upcoming Federal Fiscal Year (FFY), which will include:

1. Identification of the DBE Liaison Officer
2. Plan of race-neutral measures to implement for the forthcoming FFY
3. Prompt payment provisions to be used in contracts
4. Monitoring and enforcement mechanisms to ensure that subcontractors are promptly paid

DBE Implementation Agreement for Local Agencies

A DBE Implementation Agreement for Local Agencies (Exhibit 9-A) form must be completed and submitted to the DLAE for execution by each agency before a request for authorization is processed. This agreement will need to be signed by a representative who is authorized by the governing body to take such action.

Some of the elements of the Agreement are highlighted below.

Objective/Policy Statement

Each agreement contains a policy statement expressing a commitment to the Caltrans DBE Program, stating its objectives, and outlining responsibilities for its implementation. Each local agency will circulate the statement throughout its organization and to the DBE and non-DBE business communities that perform work on its federal-aid contracts.

Local Agency DBE Annual Submittal Form

Each local agency must provide the DLAE with a completed Local Agency DBE Annual Submittal Form (Exhibit 9-B), by June 30 of each year for the following Federal Fiscal Year. This form must be received prior to submitting a "Request for Authorization" to proceed with a federal-aid project. This form will include:

1. Designated DBE Liaison Officer information (name, address, phone number, and e-mail address).
2. Detail of planned race-neutral measures to be implemented as required by 49 CFR 26.51 and as outlined in the local agency's DBE Implementation Agreement for Local Agencies (Exhibit 9-A).
3. The local agency's choice for method of Prompt Payment of Withheld Funds to Subcontractors, as well as a brief explanation of the monitoring and enforcement mechanisms the local agency has in place to ensure that all subcontractors, including DBEs, are promptly paid.

Overall Statewide DBE Goal

The overall statewide DBE goal is obtained through race-conscious and race-neutral components. The overall statewide goal is shown on the DLA DBE website at:

http://www.dot.ca.gov/hq/LocalPrograms/DBE_CRLC.html

Race-Neutral Component

The race-neutral component of the overall statewide DBE goal is accomplished when the prime consultant is a DBE firm or when DBE participation exceeds the contract DBE goal. Examples of race-neutral DBE participation are:

- A DBE wins a prime contract through customary competitive procurement procedures.
- A DBE is awarded a subcontract on a prime contract that does not carry a DBE goal.
- The DBE commitment exceeds the DBE contract goal.

Race-neutral means include, but are not limited to, the following:

- Arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate DBE and other small business participation (e.g., unbundling large contracts to make them more accessible to small businesses, and requiring or encouraging prime contractors to subcontract portions of work that they might otherwise perform with their own forces).
- Providing assistance in overcoming limitations such as inability to obtain bonding or financing (e.g., by such means as simplifying the bonding process, reducing bonding requirements, eliminating the impact of surety costs from bids, and providing services to help DBEs and other small businesses obtain bonding and financing).
- Providing technical assistance and other services.
- Carrying out information and communications programs on contracting procedures and specific contract opportunities (e.g., ensuring the inclusion of DBEs and other small businesses on recipient mailing lists for bidders; ensuring the dissemination to bidders on prime contracts of lists of potential subcontractors, provision of information in languages other than English, where appropriate).
- Implementing a supportive services program to develop and improve immediate and long-term business management, record keeping, and financial and accounting capabilities for DBEs and other small businesses.
- Providing services to help DBEs and other small businesses, improve long-term development, increase opportunities to participate in various types of work, handle increasingly significant projects, and achieve eventual self-sufficiency.
- Establishing a program to assist new start-up firms, particularly in fields in which DBE participation has historically been low.
- Ensuring distribution of the DBE directory through print and electronic means to the widest feasible universe of potential prime contractors.

Civil Rights & Disadvantaged Business Enterprise

- Assisting DBEs and other small businesses to develop their capability to utilize emerging technology and conduct business through electronic media.

Race-Conscious Component

The use of contract goals is the primary example of a race-conscious measure in the DBE program. Local agencies must establish contract goals on each federal-aid contract where there are subcontractable opportunities for DBEs.

DBE Liaison Officer

Each local agency must designate a Disadvantaged Business Enterprise Liaison Officer (DBELO) who shall have direct independent access to the local agency's Chief Executive Officer concerning DBE program matters. This person shall be responsible for the duties as described in the DBE Implementation Agreement for Local Agencies (Exhibit 9-A). Annually, the DBELO designation will be reported to Caltrans when the local agency completes its Local Agency DBE Annual Submittal Form (Exhibit 9-B).

Required Contract Clauses

These and other requirements of this chapter are included in the Required Federal-aid Contract Language (Exhibit 12-G).

Contract Assurance

DBE regulations require the following contract assurance statement in every federal-aid contract and subcontract:

"The contractor or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR 26 in the award and administration of DOT-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract, or such other remedy as recipient deems appropriate."

Prompt Progress Payment to Subcontractors

Attention is directed to Section 7108.5 of the California Business and Professions Code, which requires a prime contractor or subcontractor to pay any subcontractor not later than seven (7) days of receipt of each progress payment, unless otherwise agreed to in writing.

These requirements apply to both DBE and non-DBE subcontractors.

Prompt Payment of Withheld Funds to Subcontractors

Federal Regulation (49 CFR 26.29) requires one of the following three methods be used in federal-aid contracts to ensure prompt and full payment of any retainage kept by the prime contractor or subcontractor to a subcontractor:

1. The local agency may decline to hold retainage from prime contractors and prohibit prime contractors and subcontractors from holding retainage from subcontractors.
2. The local agency may decline to hold retainage from prime contractors and include a contract clause, obligating the prime contractor and subcontractors to make prompt and

full payment of any retainage kept by the prime contractor or subcontractor to all subcontractors within thirty (30) days after the subcontractor's work is satisfactorily completed.

3. The local agency may hold retainage from the prime contractor and provide for prompt and regular incremental acceptances of portions of the contract, pay retainage to prime contractors based on the acceptances and include a contract clause obligating the prime contractor and subcontractors to pay all retainage owed to all subcontractors for satisfactory completion of the accepted work within thirty (30) days of local agency payment to the contractor.

In the above methods, a subcontractor's work is satisfactorily completed when all tasks called for in the subcontract have been accomplished and documented as required by the agency. The work of a subcontractor covered by that acceptance is deemed to be satisfactorily completed, when an agency has made an incremental acceptance of a portion of the contract work. Annually, the local agencies choose one of the above three methods to ensure prompt pay. The local agency's choice will be reported to Caltrans when it completes its Local Agency DBE Annual Submittal Form (Exhibit 9-B).

DBE Participation on the Contract

Participation Opportunities

The local agency should structure its contract in a manner that provides opportunities for DBE participation. Participation by DBEs is possible during the Preliminary Engineering, Environmental, Final Design, Right of Way, and Construction phases of the project, and includes work as sub-consultants, subcontractors, suppliers, vendors and truckers.

DBE Contract Goals

A DBE contract goal is a percentage of the total contract amount that is expected to be performed by certified DBE firms. Local agencies may use DBE contract goals only on those federal-aid contracts that have subcontracting opportunities. The DBE contract goal will vary depending on the type of work involved, the location of the work, and the availability of DBEs for the work of the particular contract.

In some cases, the contract goal may be zero due to the extremely limited subcontracting opportunities for DBEs, the lack of interested DBEs in the geographic area in which work is to be performed, or other reasons. Documentation is required for verifying that the local agency has determined that a zero percent DBE contract goal is appropriate.

In some cases no contract goal may be warranted (which is different from zero percent goal) as, for Emergency Relief, Sole-source, Nonprofit, or Force Account contracts.

The local agency must determine the DBE contract goal based on the work performed and the availability of certified DBEs. DBE contract goals must be consistent with the following policies:

- DBE contract goals are established in order to achieve fair DBE participation. See DBE Contract Goal Methodology (Exhibit 9-D).

Civil Rights & Disadvantaged Business Enterprise

- The project analysis starts with the availability of certified DBE contractors to perform the items of work. The contractible items of work are evaluated by the local agency in the light of the project type and size, and normal industry contracting practices.
- All contract bidders or proposers are required to meet the DBE contract goal, or document that they made adequate Good Faith Efforts (GFE) to meet the goal if they did not succeed in obtaining the DBE participation specified in the contract specifications. See Sample Evaluation of Good Faith Efforts (Exhibit 9-E).

Local Agency Bidder or Proposer DBE Commitment and DBE Information Forms

On construction contracts, the Local Agency Bidder DBE Commitment (Construction Contracts) (Exhibit 15-G) must be provided by each bidder and included in the bid. On design and engineering related consultant contracts, the Consultant Proposal DBE Commitment (Exhibit 10-O1) must be included in each consultant's proposal and the Consultant Contract DBE Information (Exhibit 10-O2) form must be included in best qualified consultant's executed consultant contract. Exhibits 15-G, 10-O1 and 10-O2 must include the names, addresses and phone numbers of DBE firms that will participate, and a complete description of work or supplies to be provided by each.

Exhibits 15-G and 10-O2 must also include the dollar value of each DBE work item or service to be performed (Exhibit 10-O1 will not have the dollar values since they are not known prior to consultant contract negotiation).

When 100% of a contract item of work is not to be performed or furnished by a DBE, a description of the exact portion of that work to be performed or furnished by that DBE should be included in the DBE information, including the planned location of that work. A bidder certified as a DBE should describe the work it has committed to perform with its own forces, as well as any other work that it has committed to be performed by DBE subcontractors, suppliers, and trucking companies.

The bidder or proposer is required to provide written confirmation from each DBE participating in the contract. A copy of a DBE's quote will serve as written confirmation that the DBE is participating in the contract. If a DBE is participating as a joint venture partner, the bidder or proposer is encouraged to submit a copy of the joint venture agreement.

Exhibit 15-G or 10-O2 shall be included in the construction or consultant contract whether or not there is a DBE goal on the contract. The local agency shall submit this form to the DLAE within 30 days of contract execution for timely reporting. The purpose of these forms is to capture all DBE participation, or in instances when there is no DBE contract goal, DBE participation acquired through normal contracting procedures as required under 49 CFR 26.

Final Report

Upon completion of the construction or consultant contract, regardless of whether DBE participation was obtained, a summary of the DBE records shall be prepared, certified correct, and submitted on the Final Report-Utilization of DBE, First-Tier Subcontractors (Exhibit 17-F), or equivalent by the contractor to the local agency showing total dollars paid to each subcontractor and supplier whether DBE or non-DBE. Exhibit 17-F is reviewed by the local

Civil Rights & Disadvantaged Business Enterprise

agency and certified as complete and accurate. The information in this report is required by the DBE Program and the FHWA to demonstrate DBE participation on local agency projects.

Consultant Contracts

The local agency must send the original plus one copy of the completed Exhibit 17-F with the final invoice to the DLAE within thirty (30) days after completion of the contract (see Chapter 10, "Consultant Selection," of the LAPM).

Construction Contracts

The local agency must send the original copy plus one copy of the completed Exhibit 17-F to the DLAE as part of its "Report of Expenditure" package before final payment (see Chapter 17, "Project Completion," of the LAPM).

Counting DBE Participation

Actual payment to subcontractors that are certified DBEs performing a commercially useful function will be counted as DBE participation. If the prime contractor is a qualified DBE, his/her work is reported and counted.

Work Performed by DBEs

When a DBE participates in a contract, count only the value of the work actually performed by the DBE.

- Count the entire amount of that portion of a contract that is performed by the DBE's own forces. Include the cost of supplies and materials obtained by the DBE for the work of the contract, supplies purchased or equipment leased by the DBE (except supplies and equipment the DBE subcontractor purchases or leases from the prime contractor or its affiliate).
- Count the entire amount of fees or commissions charged by the DBE firm for providing a bona fide service, such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of a federal-aid contract, provided that the local agency determines the fee to be reasonable and not excessive as compared with fees customarily allowed for similar services.
- When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted towards DBE participation only if the DBE's subcontractor is itself a DBE. Work that a DBE subcontracts to a non-DBE firm does not count toward DBE participation.

Joint Venture

When a DBE performs as a participant in a joint venture, count a portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract that the DBE performs with its own forces towards the DBE participation. The DBE's share of each of the following must commensurate with its ownership interest in the joint venture: capital contribution, control, management, risks and profits.

Commercially Useful Function

Count expenditures to a DBE contractor, only if the DBE is performing a commercially useful function on that contract. The following examples explain what is considered to be performing a commercially useful function:

- A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a commercially useful function, the DBE must also be responsible with respect to materials and supplies used on the contract for negotiating price, determining quality and quantity, ordering the material and installing (where applicable), and paying for the material itself. To determine whether a DBE is performing a commercially useful function, the local agency must evaluate the amount of work subcontracted; industry practices; whether the amount the firm is to be paid under the contract is commensurate with the work it is actually performing and the DBE credit claimed for its performance of the work; and other relevant factors.
- A DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation. In determining whether a DBE is such an extra participant, the local agency must examine similar transactions, particularly those in which DBEs do not participate.
- If a DBE does not perform or exercise responsibility for at least 30% of the total cost of its contract with its own work force, or the DBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved, one must presume that it is not performing a commercially useful function.
- When a DBE is presumed not to be performing a commercially useful function, as provided in the previous bullet, the DBE may present evidence to rebut this presumption. The local agency's determination as to whether the firm is performing a commercially useful function should be based upon the type of work involved and normal industry practices.
- Local agencies' decision on commercially useful function matters are subject to review by the DLAE.

DBE Trucking

Use the following factors in determining whether a DBE trucking company is performing a commercially useful function:

- The DBE must be responsible for the management and supervision of the entire trucking operation for which it is getting credit on a particular contract, and there cannot be a contrived arrangement for the purpose of counting DBE participation.
- The DBE must itself own and operate at least one fully licensed, insured, and operational truck used on the contract.

Civil Rights & Disadvantaged Business Enterprise

- The DBE receives credit for the total value of the transportation services it provides on the contract using trucks it owns, insures, and operates using drivers it employs.
- The DBE may lease trucks from another DBE firm including an owner-operator, who is certified as a DBE. The DBE who leases trucks from another DBE receives credit for the total value of the transportation services the lessee DBE provides on the contract.
- The DBE may also lease trucks from a non-DBE firm, including an owner-operator. The DBE who leases trucks from a non-DBE is entitled to credit only for the fee or commission it receives as a result of the lease arrangement. The DBE does not receive credit for the total value of the transportation services provided by the lessee, since these services are not provided by a DBE.

Materials and Supplies

Count expenditures with DBEs for materials or supplies toward DBE participation as provided in the following:

- If the materials or supplies are obtained from a DBE manufacturer, count 100% of the cost of the materials or supplies toward DBE participation.

NOTE: For purposes of counting DBE participation, a manufacturer is a firm that operates or maintains a factory or establishment that produces on the premises, materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications.

- If the materials or supplies are purchased from a DBE regular dealer, count 60% of the cost of the materials or supplies toward DBE participation.

NOTE: For purposes of counting DBE participation, a regular dealer is a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business.

- To be a regular dealer, the firm must be an established business that regularly engages, as its principal business and under its own name in the purchase and sale or lease of the products in question.

A person may be a regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone, or asphalt without owning, operating, or maintaining a place of business, if the person both owns and operates distribution equipment for the products. Any supplementing of regular dealers' own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis. Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not considered regular dealers for purposes of counting DBE participation.

With respect to materials or supplies purchased from a DBE, which is neither a manufacturer nor a regular dealer, count the entire amount of fees or commissions charged for assistance in the procurement of the materials and supplies, fees or

Civil Rights & Disadvantaged Business Enterprise

transportation charges for the delivery of materials or supplies required on a job site toward DBE participation, provided the local agency determines the fees to be reasonable and not excessive as compared with fees customarily allowed for similar services. However, do not count any portion of the cost of the materials and supplies themselves toward DBE participation.

- A lease must indicate that the DBE has exclusive use of and control over the truck. This does not preclude the leased truck from working for others during the term of the lease with the consent of the DBE, so long as the lease gives the DBE absolute priority for use of the leased truck.

DBE Participation Not Counted

If a firm is not currently certified as a DBE at the time of the execution of the contract, do not count the firm's participation, except as provided for under "Decertification" of this section.

Do not count the dollar value of work performed under a contract with a firm after it has ceased to be certified.

Do not count the participation of a DBE subcontractor toward the prime contractor's DBE achievements or the local agency's overall participation until the amount being counted toward the participation has been paid to the DBE.

Apparent Lack of Control

In order for a firm to become a certified DBE, it should meet the various requirements prescribed in the CFR, as administered by the California Unified Certification Program (CUCP). The DBE must "possess the power to direct or cause..." 49 CFR 26.71(d).

Some situations may arise where the work to be performed by the DBE is being performed by someone else. The local agency will have to use discretion on when to investigate or report apparent cases of fraud to Caltrans. Caution is needed because those involved in performing the work may legitimately be doing so. The three areas are as follow:

1. Individuals who are not socially and economically disadvantaged may be involved in a DBE firm as owners, managers, employees, stockholders, officers, and/or directors. Such individuals must not, however, possess or exercise the power to control the firm, or be disproportionately responsible for the operation of the firm.
2. The socially and economically disadvantaged owners of the firm may delegate various areas of the management, policymaking, or daily operations of the firm to other participants in the firm, regardless of whether these participants are socially and economically disadvantaged individuals. Such delegations of authority must be revocable. The socially and economically disadvantaged owners must retain the power to hire and fire any person to whom such authority is delegated. The managerial role of the socially and economically disadvantaged owners in the firm's overall affairs must be, such that the recipient can reasonably conclude that the socially and economically disadvantaged owners actually exercise control over the firm's operations, management, and policy.

Civil Rights & Disadvantaged Business Enterprise

3. The socially and economically disadvantaged owners must have an overall understanding of, and managerial, technical competence and experience directly related to the type of business in which the firm is engaged and the firm's operations. The socially and economically disadvantaged owners are not required to have experience or expertise in each critical area of the firm's operations, or to have greater experience or expertise in a given field than managers or key employees. The socially and economically disadvantaged owners must have the ability to intelligently and critically evaluate information presented by other participants in the firm's activities; to use this information to make independent decisions concerning the firm's daily operations, management, and policymaking. Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the firm is insufficient to demonstrate control.

DBE Eligibility

The CUCP certifies and determines the eligibility of DBE consultant and contractor firms. The CUCP can also remove the eligibility of a firm and issue a written notice of ineligibility. A directory of certified DBE firms is available from the Caltrans Civil Rights, Certification Unit website at: http://www.dot.ca.gov/hq/bep/find_certified.htm

Certification

A potential DBE may request certification from Caltrans by requesting an application form at:

Department of Transportation
[Office of Business and Economic Opportunity](#)
Certification Unit
1823 14th Street, MS-79
Sacramento, CA 95811
DBE_Certification@dot.ca.gov

The form may also be downloaded from the Internet at:

http://www.dot.ca.gov/hq/bep/business_forms.htm

Decertification

If a DBE firm becomes ineligible in the middle of a contract (i.e., due to decertification), only that portion of work performed while certified will count toward DBE participation claimed by the local agency and Caltrans. If the DBE is already under contract prior to becoming ineligible, its participation is eligible to be counted toward meeting the contract goal by the prime contractor/consultant.

If the DBE's ineligibility is caused solely by its having exceeded the size standard during the performance of the contract, the local agency may continue to count its participation on that contract toward overall and contract participation.

Appeal

When the CUCP makes an administratively final removal of a firm's eligibility, the firm may appeal the removal to the DOT under Section 26.89 of 49 CFR 26. Caltrans will provide information for an appeal with the removal of eligibility.

9.7 Good Faith Efforts

NOTE: For purposes of this section "bidder" also includes "proposer," "contractor" includes "consultant" and "subcontractor" includes "subconsultant."

When a Local Agency establishes a DBE contract goal on a federal-aid contract, a bidder must, in order to be responsive, make Good Faith Efforts (GFEs) to meet the DBE contract goal. The bidder can meet this requirement in either of two ways. First, the bidder can meet the goal, documenting commitments for participation by DBE firms sufficient to meet the goal. Second, if the bidder does not meet the goal, the bidder can provide documentation in support of their adequate GFEs. This means that the bidder must show that they took all necessary and reasonable measures to achieve the DBE contract goal. The bidder could reasonably be expected to obtain maximum possible DBE participation even if they were not fully successful in meeting the DBE contract goal. A Local Agency shall require a bidder to meet the DBE contract goal or meet the burden of proof of GFEs in order to be awarded a contract.

In any situation in which a DBE contract goal has been established, the use of GFEs must be allowed. Each Local Agency must make a fair and reasonable judgment whether a bidder that did not meet the set goal made adequate GFEs. It is important to consider the quality, quantity, and intensity of the different kinds of efforts that the bidder has made. The efforts employed by the bidder should be those that one could reasonably expect a bidder to take if the bidder were actively and aggressively trying to obtain DBE participation sufficient to meet the DBE contract goal. Mere *pro forma* efforts are not GFEs to meet the DBE contract requirements. We emphasize that the local agency's determination concerning the sufficiency of the bidder's GFEs is a judgment call and meeting quantitative formulas is not required.

Caltrans strongly cautions local agencies against requiring that a bidder meet a DBE contract goal in order to be awarded a contract, even though the bidder makes an adequate GFE showing. Title 49 CFR 26 specifically prohibits federal-aid recipients from ignoring *bona fide* GFEs.

Anticipated Good Faith Efforts

The following types of actions should be considered by a Local Agency as part of the bidder's Good Faith Efforts (GFEs) to obtain DBE participation. It is not intended to be exclusive or exhaustive. Determining the adequacy of a bidder's GFEs to achieve DBE contract goals is a judgment call. Other factors or types of efforts may be relevant in appropriate cases.

- Soliciting through all reasonable and available means (e.g., attendance at pre-bid meetings, advertising and/or written notices) the interest of all certified DBEs that are capable of performing the work of the contract. The bidder must solicit this interest by allowing the DBEs sufficient time to respond to the solicitation. The

Civil Rights & Disadvantaged Business Enterprise

bidder must determine with certainty if the DBEs are interested by taking appropriate steps to follow up the initial solicitation to the DBEs.

- Selecting portions of the work to be performed by DBEs in order to increase the likelihood that the DBE contract goal will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate DBE participation, even when the prime contractor might otherwise prefer to perform these work items with their own forces.
- Providing interested DBEs with adequate information about the plans, specifications, and requirements of the contract in a timely manner to assist them in responding to a solicitation.
- Negotiating in good faith with interested DBEs. It is the bidder's responsibility to make a portion of the work available to DBE subcontractors and suppliers, and to select those portions of the work or material needs consistent with the available DBE subcontractors and suppliers, so as to facilitate DBE participation. Evidence of such negotiation includes: names, addresses, and telephone numbers of DBEs that were considered; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why agreements could not be reached with the DBEs who were not selected to perform the work.
- A bidder using good business judgment would consider a number of factors in negotiating with subcontractors, including DBE subcontractors, and would take a firm's price and capabilities as well as the DBE contract goals into consideration. However, the fact that there may be some additional costs involved in finding and using DBEs is not in itself sufficient reason for a bidder's failure to meet the DBE contract goal, as long as such costs are reasonable. Also, the ability or desire of a prime contractor to perform the work of a contract with its own organization does not relieve the bidder of the responsibility to make GFEs. Prime contractors are not, however, required to accept higher quotes from DBEs if the price difference is excessive or unreasonable.
- Not rejecting DBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. The contractor's standing within its industry, membership in specific groups, organizations, or associations, and political or social affiliations (for example, union vs. non-union employee status) are not legitimate causes for the rejection or non-solicitation of bids or proposals in the contractor's efforts to meet the DBE contract goal.
- Making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by the recipient or contractor.
- Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.
- Effectively using the services of available minority or women community organizations; minority or women contractors or consulting groups; local, state, and Federal minority or women business assistance offices; and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of DBEs.

The above actions are typically documented by the bidder on DBE Information – Good Faith Efforts (Exhibit 15-H), which is to be included in the bid package. This information is used by the Local Agencies to determine if the GFE was adequate or not prior to awarding the contract.

Civil Rights & Disadvantaged Business Enterprise

In determining whether a bidder has made GFEs, the Local Agency may take into account the performance of other bidders in meeting the DBE Contract Goal. The Local Agency should evaluate GFEs considering the DBE commitments of the 2nd and 3rd bidders. For example, when the apparent successful bidder fails to meet the DBE contract goal, but the 2nd and 3rd bidders meet it, it may reasonably raise the question of whether, with additional reasonable efforts, the apparent successful bidder could have met the goal. If the apparent successful bidder fails to meet the goal, but meets or exceeds the DBE participation obtained by the 2nd and the 3rd bidders, this along with other supporting factors may be viewed as evidence of the apparent successful bidder having met the burden of proof of GFEs.

See the *Civil Rights Disadvantaged Business Enterprise Evaluating Good Faith Efforts* video on the FHWA Federal-aid Essentials for Local Public Agency website at:

<http://www.fhwa.dot.gov/federal-aidessentials/index.cfm>

The Local Agency should ensure that the following is included in the contract special provisions:

The Local Agency may consider the DBE commitments of the 2nd and 3rd bidders when determining whether the low bidder made Good Faith Efforts to meet the DBE contract goal.

For projects awarded based on a GFE, the Local Agencies must prepare and submit with the award package Sample Evaluation of Good Faith Efforts (Exhibit 9-E), that cites reasons as to why the GFE is adequate. In addition, Exhibit 15-H, without supporting documentation, should be included in the award package.

NOTE: Exhibit 15-H and Exhibit 9-E need not be submitted with the award package, if the low bidder has met the DBE contract goal. However, bidders should be encouraged to submit Exhibit 15-H with their bid package, even if they believe they have met the DBE contract goal, in case errors are found in the “Local Agency Bidder DBE Commitment (Construction Contracts)” (Exhibit 15-G).

Administrative Review and Reconsideration

An administrative review (See 49 CFR 26.53) and evaluation of the Good Faith Efforts (GFEs) should be made prior to award in each instance by the Local Agency. If the Local Agency determines that the apparent successful bidder has failed to meet the GFEs requirements, the Local Agency, before awarding the contract, must provide the apparent successful bidder the opportunity for administrative reconsideration in accordance with 49 CFR 26.53.

Substitutions

After a contract, which specified goals for the DBE participation, has been executed, adequate Good Faith Efforts (GFEs) are required for any needed substitution of DBE subcontractors to the extent needed to meet the DBE contract goal.

Local Agencies must require a prime contractor not to terminate for convenience a DBE subcontractor listed in Exhibit 15-G or an approved substitute DBE subcontractor and have the work performed of the terminated subcontract with its own forces or those of an affiliate without the Local Agency’s prior written consent.

When a DBE subcontract is terminated or when a DBE subcontractor fails to complete its work on the contract for any reason, the Local Agency must require the prime contractor to make GFEs to find another DBE subcontractor to substitute for the original DBE subcontractor. These GFEs shall be directed at finding another DBE subcontractor to perform at least the same amount of work under the contract as the DBE subcontractor that was terminated to the extent needed to meet the DBE contract goal.

Noncompliance

Local Agencies must include in each prime contract a provision for appropriate sanctions that will be involved if the prime contractor fails to fulfill the DBE commitments made at the time of execution of the contract. The Local Agencies should deny payment to the prime contractor for the portion of the contract that was committed at the time of contract execution to be performed by a DBE subcontractor but was completed by the prime contractor or a substitute non-DBE subcontractor.

9.8 References

- [49 CFR, Part 26](#) (DBE Regulations)
http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&tpl=/ecfrbrowse/Title49/49cfr26_main_02.tpl
- [49 CFR, Part 21](#) (Title VI Regulations)
http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&tpl=/ecfrbrowse/Title49/49cfr21_main_02.tpl
- [49 CFR, Part 27](#) (Accessibility)
http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&tpl=/ecfrbrowse/Title49/49cfr27_main_02.tpl
- [23 CFR 200](#) and [230](#) (EEO Contractor Compliance)
<http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&rgn=div5&view=text&node=23:1.0.1.3.7&idno=23>
- [28 CFR, Part 35](#) (Accessibility)
<http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&rgn=div5&view=text&node=28:1.0.1.1.36&idno=28>
- [23 USC 140\(a\)](#) (EEO Contractor Compliance)
<https://www.gpo.gov/fdsys/granule/USCODE-1995-title23/USCODE-1995-title23-chap1-sec140/content-detail.html>
- [29 USC 791](#) et. Seq. (Accessibility)
<https://www.gpo.gov/fdsys/granule/USCODE-2010-title29/USCODE-2010-title29-chap16-subchapV-sec791/content-detail.html>
- [42 USC 12101](#) et. Seq. (Accessibility)
<http://www.ada.gov/pubs/adastatute08.htm>
- [California Business and Professions Code, Section 7108.5](#) (Prompt Payment)
<http://law.onecle.com/california/business/7108.5.html>

- [Title 24 of the California Government Code](http://www.bsc.ca.gov/Home.aspx) (Accessibility)
<http://www.bsc.ca.gov/Home.aspx>